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# Supreme Court of the United States

OCTOBER TERM, 1962

No. 452

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VITO F. LANZA and CHARLES F. RANK,

*Appellants,*

*against*

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Appellees.*

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## MEMORANDUM ON BEHALF OF APPELLANTS IN OPPOSITION TO MOTIONS TO DISMISS BY BOTH APPELLEES.

The grounds on which both appellees rest their respective motions to dismiss the appeal, are in practical effect identical, and entirely lacking in any semblance of merit.

The Statement for Jurisdiction filed by appellants, anticipated, on the basis of the positions taken by the appellees in the New York State Courts—that their respective motions to dismiss would be made on the grounds on which they are rested. The Statement for Jurisdiction is a complete answer to both motions.

It is deemed appropriate to refer to the then current public events, of which judicial notice may be taken. The New York City daily newspapers, for months before the enactment of the New York State Statute, and for months before Election Day—the entire matter was a "hot" political issue in the Mayoralty campaign—carried front page headlined items, in which the Mayor or other public officials

charged the Board with inefficiency, laxity and other misconduct, and that the Mayor had demanded the resignations of the entire Board. The Board consisted of nine members, six of whom resigned and three of whom refused to resign.

Both the Mayor and the Commissioner of Education could have brought on proceedings for the removal of the members of the Board, but this required statutory notice and a hearing. There never were any formal charges; nor were there any proceedings for removal instituted.

**As to whether Federal questions raised are moot**

The term of appellant Rank was not set to expire until 1964. The mere circumstance that the term of appellant Lanza was set to expire in 1962 does not render the Federal questions raised moot.

**All Federal questions were raised in Court below**

The Federal questions raised are these:

(A) Whether the New York State Statute violates Article 1, § 10 of the Constitution of the United States, insofar as said Article provides that no State shall pass any Bill of Attainder.

(B) Whether said New York State Statute violates Article 4 of the Constitution of the United States, insofar as said Article provides that the United States shall guarantee to every State a Republican Form of Government.

(C) Whether said New York State Statute violates Amendment XIV, § 1, of the Constitution of the United States, insofar as said Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Appellees concede that questions (A) and (C) were properly raised in the Courts below. Appellees erroneously contend that question (B) was not raised in the Courts below.

The simple fact is that all three opinions in the Court of Appeals treat with question (B)—that is whether the legislation constituted a valid or invalid delegation of power to "private" persons, in "private" associations.

The question as to whether the legislation was valid or invalid, because of the delegation of power to appoint to public office, is a broad question. Whether the power to appoint to public office is in the nature of an executive function, as claimed by appellees, rather than in the nature of a legislative function is beside the point.

In a Republic the power which the people have vested in either the executive, the judiciary, or the legislature, may not be delegated to "private" persons, who happen to be officers of "private" organizations.

This is the broad Federal question presented, and obviously the Court of Appeals of the State of New York—in which there were extended opinions, on both sides of the question, treated with the broad question of whether in a Republic, the power to appoint to public office may be delegated, rather than the narrow question as to whether that may be done under a specific provision of the New York State Constitution.

In the Court of Appeals, the majority opinion cites 22 cases all from other jurisdictions, as to this phase of the case, in support of the conclusion reached that the legislation was valid. Obviously these 22 cases from jurisdictions other than New York State, could have considerable bearing on the question as to whether in a Republic, there may be delegation of power to appoint to public office, to "private" persons, but very little bearing on the narrow question as to whether the legislation was

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Appellants raise all of
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SAMUEL SHAPIRO,
*of Counsel.*

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questions (A), (B) and (C) in

CLUSION

**the appeal should be denied.**

lly submitted,

VITO F. LANZA
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